1994

Carolyn Carter n/k/a Carolyn O'Brien v. Judy A. Laursen n/k/a Judy A. Benson and Jennifer Jean Laursen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CAROLYN CARTER, n/k/a CAROLYN O'BRIEN Plaintiff/Appellant, vs. JUDY A. LAURSEN n/k/a/ JUDY A. BENSON and JENNIFER JEAN LAURSEN, Defendants/Appellees.	)	Case No. 940534-CA Priority 15

BRIEF OF APPELLEES

APPEAL FROM AN ORDER GRANTING SUMMARY JUDGMENT
IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY,
STATE OF UTAH, BY THE HONORABLE J. PHILIP EVES, DISTRICT JUDGE

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STATEMENT OF JURISDICTION

This is an appeal of an Order Granting Defendants' Motion for Summary Judgment entered by Judge J. Philip Eves of the Fifth District Court. (R.218-19). This Court has jurisdiction of this appeal pursuant to Utah Code Ann. §78-2a-3(2)(j).

STATEMENT OF ISSUES

1. Did the District Court properly grant summary judgment in favor of Appellees on the basis that Appellant failed to establish that she met any of the threshold criteria enumerated in Utah Code Ann. §31A-22-309(1)?

2. Should this Court determine issues raised for the first time by Appellant on appeal, and has Appellant properly preserved these issues for appeal?

In reviewing cases disposed of by summary judgment the reviewing court determines whether or not there are genuine issues of material fact that preclude summary judgment and the correctness of the application of controlling law. Ferree v. State, 784 P.2d 149, 151 (Utah 1989); Themy v. Seagull Enter., Inc., 595 P.2d 526 (Utah 1979).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Interpretation of the following statutes is determinative of this appeal: Utah Code Ann. §31A-22-309(1) (1953 as amended); Utah Code Ann. §68-3-3 (1953 as amended).

STATEMENT OF THE CASE

A. Nature of the Case

This case arises from alleged personal injury sustained by Appellant in an automobile accident which allegedly occurred on January 2, 1990 in Parowan, Iron County, Utah.

B. Course of the Proceedings

Appellees made a Motion for Summary Judgment which was granted on April 14, 1994 by Judge J. Philip Eves of the Fifth District Court prior to trial. (R. 218-19).

C. Disposition at Trial Court

The trial court granted Appellees' Motion for Summary Judgment.

D. Statement of Facts

The following Statement of Facts is taken in large part from the Statement of Material Facts contained in Appellees' Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment. (R.166-68).

1. On or about January 3, 1992, Appellant served a Summons and Complaint upon Appellees alleging personal injuries resulting from an automobile accident which occurred on January 2, 1990 in Parowan, Utah. (R.1-11).

2. This case was originally scheduled for a four-day jury trial on December 7, 1993. Due to inability to seat an impartial

jury, a mistrial was declared and the case was rescheduled for trial on April 12, 1994. (See R.71, 157).

3. Following the mistrial, and pursuant to stipulation of counsel for all parties, the deposition of the Appellant's treating physician, D. Ross McNaught, M.D., was taken on January 21, 1994. (See R.160-63).

4. In his deposition, Dr. McNaught testified as follows:

Q. Okay. I want to make sure I understand, Doctor. Have you rendered a disability rating as a result of her automobile accident?
A. No. Only an impairment rating.
Q. Are you prepared to render a disability rating as a result of her accident?
A. No. That is not my job.
Q. You wouldn't be able to testify about a disability rating in any way, shape or form?
A. It's not a medical decision, sir.
Q. So I take it the answer is you wouldn't be able to?
A. No.

• • •

Q. Okay. Have you, at any time, undertaken any evaluation of Miss Carter's work requirements or work-related activities for purposes of establishing whether she can or cannot perform them?
A. As far as what she has is training for now?
Q. Or what she's done in the past.
A. I'm not sure I understand the question.
Q. Well, I'm really getting at this concept of disability. Have you done any sort of study of what her work requirements are or what she's required to do or what she will be required to do if she becomes a counselor?
A. No, I haven't.

(R.175-78).

5. On March 3, 1994, Appellees filed a Motion for Summary Judgment on the basis that Appellant had failed to establish that she

met any of the threshold criteria for maintaining a suit for general damages contained at Utah Code Ann. §31A-22-309(1). (R.164-65).

6. In her Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment, Appellant admitted that "the only plausible basis for her having met the threshold under Section 31A-22-309(1) of the Utah Code is a permanent disability." (R.189).

7. On April 4, 1994, Judge J. Philip Eves of the Fifth District Court held a hearing on Appellees' Motion for Summary Judgment. Following the hearing Judge Eves entered a Minute Entry granting the Motion for Summary Judgment and stating, "There is no evidence of permanent disability." (R.207).

8. On April 13, 1994, Judge Eves signed an Order Granting Defendant's Motion for Summary Judgment. In the Order Judge Eves found as follows:

> 1. Plaintiff admits that the only way she can meet the elements required for maintaining a cause of action set forth in Utah Code Ann. §31A-22-309(1) is through establishing that she has sustained "permanent disability."
>
> 2. Plaintiff has failed to set forth evidence from any competent expert witness establishing that she has been rendered unable to work in any capacity as a result of the automobile accident at issue in this case. Plaintiff has therefore failed to present evidence sufficient under Rule 56 of the Utah Rules of Civil Procedure to establish that she has sustained "permanent disability" as set forth in Utah Code Ann. §31A-22-309(1).

Consistent with the foregoing, the Court hereby ORDERS that Defendants' Motion for Summary Judgment is hereby granted.

(R.218-19).

SUMMARY OF THE ARGUMENT

In her Brief (hereinafter "Br. at _____") Appellant makes repeated reference to portions of depositions never made part of the record on appeal, and not presented to and/or considered by the trial court in granting summary judgment. Such references are made in contravention of Rules 11(e) and 24(a)(7) of the Utah Rules of Appellate Procedure.

Appellant argues that an amendment to Utah Code Ann. §31A-22-309(1) which adds "permanent impairment based upon objective findings" as a criterion for meeting the threshold requirements for maintaining a lawsuit for general damages, although not in effect at the time of the accident at issue or at the time the trial court granted Appellees' Motion for Summary Judgment, should be retroactively applied. (Br. at 5-9). This argument was not raised at any time in the trial court, and is thus precluded from consideration on appeal.

Even if Appellant had properly raised her argument that the subsequent amendment to the threshold statute should be retroactively applied in the trial court, the amendment to the statute cannot be applied retroactively pursuant to Utah Code Ann. §68-3-3, and does

not meet any of the criteria and/or requirements for retroactive application established by Utah case law.

Appellant also argues that the trial court erred in granting Appellees' Motion for Summary Judgment because Appellant raised a genuine issue of material fact as to whether she has suffered "permanent disability" within the meaning of Utah Code Ann. §31A-22-309(1). (See Br. at 9-14). A review of the record on appeal establishes that the trial court properly found that Appellant failed to present any competent evidence of "permanent disability" sufficient to defeat a motion for summary judgment under Rule 56 of the Utah Rules of Civil Procedure, and the trial court's grant of summary judgment should, therefore, be affirmed.

ARGUMENT

I.

APPELLANT'S ARGUMENT THAT A SUBSEQUENT AMENDMENT TO §31A-22-309(1) TO INCLUDE "PERMANENT IMPAIRMENT BASED ON OBJECTIVE FINDINGS" AS A THRESHOLD CRITERION SHOULD BE RETROACTIVELY APPLIED IS PRECLUDED BECAUSE IT WAS NOT RAISED IN THE TRIAL COURT.

It is axiomatic that matters and arguments not presented to the trial court may not be raised for the first time on appeal. See e.g. Progressive Acquisition, Inc. v. Lytle, 806 P.2d 239, 242 (Utah App. 1991); Wurst v. Department of Employment Security, 818 P.2d 1036, 1039 (Utah App. 1991). Preclusion of appellate court consideration of arguments raised for the first time on appeal has been held by this Court to apply in a situation where retroactive application of a

statute was first raised and argued on appeal. In State v. Smith, 812 P.2d 470 (Utah App. 1991), this Court was asked to retroactively apply an amendment to a state statute establishing a thirty-day time requirement on motions to withdraw guilty pleas. This Court, noting that the argument of untimeliness of the motion to withdraw the guilty plea under the amended statute had not been raised in the trial court, stated as follows:

> We do not reach the issue of whether amended Section 77-13-6 applies retroactively, because even if it does so apply, the State's untimeliness argument was not raised in the trial court, and was therefore not preserved for appeal.

Id. at 475-76.

Because Appellant in the present case did not raise the issue of retroactivity of the amendment to the threshold statute in the trial court, thus precluding trial court consideration of the argument, Appellant is precluded from raising the issue in this Court for the first time on appeal.

II.

THE SUBSEQUENT AMENDMENT TO §31A-22-309(1)(c), ADDING "PERMANENT IMPAIRMENT BASED ON OBJECTIVE FINDINGS" AS A THRESHOLD CRITERION DOES NOT APPLY RETROACTIVELY.

Even if Appellant has properly raised her argument that the amendment to Section 31A-22-309(1)(c) adding "permanent impairment based on objective findings" as a threshold criterion for maintaining a suit for general damages should be applied retroactively, Utah law

precludes retroactive application of the amendment. The accident at issue in this case occurred on January 2, 1990, and the trial court's order granting Appellees' Motion for Summary Judgment was entered on April 13, 1994. (R.2; 218-19). The amendment to Section 31A-22-309(1) adding "permanent impairment based upon objective findings" as a threshold criterion did not become law until May 2, 1994. (See Amendment Notes contained in Appendix A). Utah Code Ann. §68-3-3 provides, "No part of these revised statutes is retroactive unless expressly so declared." The amendment which Appellant seeks to have this Court apply retroactively contains no such expressed declaration of retroactive application.

Utah courts have recognized a narrow exception to the rule that statutory amendments do not apply retroactively absent express declaration in situations where the amendments are merely procedural. See e.g. State v. Burgess, 870 P.2d 276 (Utah App. 1994). Procedural statutes which may be applied retroactively are defined as those which do not "enlarge, eliminate, or destroy vested rights." Smith v. Cook, 803 P.2d 788, 792 (Utah 1990). As this Court stated in OSI Industries v. Utah State Tax Commission, 860 P.2d 381 (Utah App. 1993):

> As a general rule, a party is entitled to have its rights determined on the basis of the law as it existed at the time of the occurrence, and the later statute or amendment should not be applied retroactively so as to deprive a party of its rights or impose greater liability upon it.

Id. at 383.

This Court has held that where an amendment to a statute limits the time a person can be placed on probation, thereby enlarging the rights of an individual who is placed on probation, the amendment is to be considered substantive, and cannot be applied retroactively. See Smith v. Cook, 803 P.2d at 792. In the present case, the amendment to the threshold statute which Appellant seeks to apply retroactively establishes a new category of individuals who may maintain an action for general damages, i.e. those having sustained permanent impairment based upon objective findings. As such, the amendment, if retroactively applied in this case, would impose greater liability upon Appellees, and thus is to be considered a substantive statute which cannot be applied retroactively.

III.

APPELLANT HAS FAILED TO ESTABLISH THAT THE TRIAL COURT ERRED IN DETERMINING THAT APPELLEES WERE ENTITLED TO SUMMARY JUDGMENT BECAUSE APPELLANT FAILED TO ESTABLISH THAT SHE HAD BEEN PERMANENTLY DISABLED.

Appellant argues that even assuming the recent amendment to Section 31A-22-309(1) does not apply retroactively, she has still presented evidence establishing that she has met the "permanent disability" threshold requirement. (See Br. at 10-14). The only "evidence" which Appellant has presented to this Court consists of references in her "Statement of Facts" (Br. at 3-5) to portions of depositions which were never made part of the record in the trial

court, and were, therefore, never considered by the trial court prior to the time it granted Appellees' Motion for Summary Judgment.

As this Court noted in Horton v. Gem State Mutual of Utah, 794 P.2d 847, 849 (Utah App. 1990), the Appellant has the burden of providing the Court of Appeals with an adequate record to preserve its arguments for review. (See also Rules 11(e)(2) and 24(a)(7) of the Utah Rules of Appellate Procedure.) In the present case, Appellant failed to order a transcript of oral argument on Appellees' Motion for Summary Judgment and also failed to make part of the record portions of depositions not provided to the trial court, and cited for the first time in Appellant's Brief. Absent evidence that the information cited for the first time on appeal was presented to the trial court, this Court will assume that the trial court's judgment was supported by sufficient evidence. (See Horton, 794 P.2d at 849.)

Even if Appellant had properly provided the trial court with evidence referred to for the first time in her Appeal Brief, the evidence in the record clearly establishes that Appellant failed to raise a genuine issue of material fact as to the existence of permanent disability. In Jones v. Transamerica Insurance Company, 592 P.2d 609 (Utah 1979), the Utah Supreme Court interpreted the meaning of "disability" as referenced in the No-fault Insurance Act. The Court stated:

> The benefits contemplated by the Act are phrased in terms of "disability" not in terms of "physical

> impairment." The former is generally understood to mean the inability to work, whereas the latter refers to the loss of bodily function.

592 P.2d at 611.

Under the analysis of the Supreme Court in Jones, Appellant, in order to meet the requirements of the tort threshold relative to permanent disability, would have had to establish not only that she had been rendered unable to work, but that the condition of inability to work was "permanent." Such determinations require expert testimony, and are not, as Appellant suggests, capable of being established through "self-serving" testimony of the Plaintiff. (See Br. at 13). For example, in Morey v. Harper, 541 So.2d 1285 (Fla. App. 1 Dist. 1989) the District Court of Appeals of Florida, First District, interpreting that State's threshold criterion of "permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement", held that whether a plaintiff had suffered "permanent injury" was a determination which could only be satisfied through presentation of expert medical testimony. The Court stated:

> Therefore, even though the phrase 'permanent injury' is not a word of art in the medical profession, nevertheless the determination of what constitutes a permanent injury must, as a practical matter, be left to physicians trained in that profession. Hence, the language requiring proof of a permanent injury based on a reasonable degree of medical probability has established a requirement that can only be satisfied by expert medical testimony.

Id. at 1288.

Likewise, in the present case, whether Appellant suffered 1) disability which was 2) permanent can be established only through presentation of expert testimony. No such testimony was presented to the trial court. Dr. McNaught's deposition testimony, which constituted the only competent expert testimony submitted to the trial court with respect to Appellees' Motion for Summary Judgment, clearly establishes that Dr. McNaught was not prepared to render any opinion as to Appellant's alleged "permanent disability" at trial. (See R. 174-78.) The trial court therefore correctly determined that Appellant failed to set forth evidence from any competent witness establishing that she has been rendered unable to work in any capacity as a result of the automobile accident at issue in this case. In sum, Appellant failed to raise a genuine issue of material fact as to her allegation that she was "permanently disabled", and the trial court therefore properly granted Appellees' Motion for Summary Judgment.

CONCLUSION

For the reasons stated above, Appellees respectfully request that this Court affirm the decision of the District Court granting summary judgment in their favor.

Respectfully submitted this 25th day of October, 1994.

RICHARD K. SPRATLEY & ASSOCIATES

By: _____
DAVID W. LUND
Attorney for Appellees

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the foregoing BRIEF OF APPELLEES, postage prepaid, this 2nd day of November, 1994, to the following:

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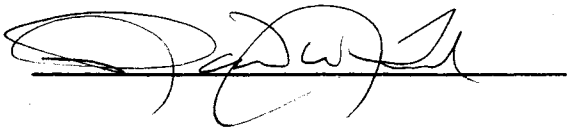

APPENDIX A

31A-22-309. Limitations, exclusions, and conditions to personal injury protection.

(1) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

(a) death;

(b) dismemberment;

(c) permanent disability or permanent impairment based upon objective findings;

(d) permanent disfigurement; or

(e) medical expenses to a person in excess of $3,000.

(2) (a) Any insurer issuing personal injury protection coverage under this part may only exclude from this coverage benefits:

(i) for any injury sustained by the insured while occupying another motor vehicle owned by or furnished for the regular use of the insured

or a resident family member of the insured and not insured under the policy;

(ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle;

(iii) to any injured person, if the person's conduct contributed to his injury:

(A) by intentionally causing injury to himself; or

(B) while committing a felony;

(iv) for any injury sustained by any person arising out of the use of any motor vehicle while located for use as a residence or premises;

(v) for any injury due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing; or

(vi) for any injury resulting from the radioactive, toxic, explosive, or other hazardous properties of nuclear materials.

(b) The provisions of this subsection do not limit the exclusions which may be contained in other types of coverage.

(3) The benefits payable to any injured person under Section 31A-22-307 are reduced by:

(a) any benefits which that person receives or is entitled to receive as a result of an accident covered in this code under any workers' compensation or similar statutory plan; and

(b) any amounts which that person receives or is entitled to receive from the United States or any of its agencies because that person is on active duty in the military service.

(4) When a person injured is also an insured party under any other policy, including those policies complying with this part, primary coverage is given by the policy insuring the motor vehicle in use during the accident.

(5) (a) Payment of the benefits provided for in Section 31A-22-307 shall be made on a monthly basis as expenses are incurred.

(b) Benefits for any period are overdue if they are not paid within 30 days after the insurer receives reasonable proof of the fact and amount of expenses incurred during the period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after that proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is also overdue if not paid within 30 days after the proof is received by the insurer.

(c) If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 1 ½% per month after the due date.

(d) The person entitled to the benefits may bring an action in contract to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any overdue benefits and interest, the insurer is also required to pay a reasonable attorney's fee to the claimant.

(6) Every policy providing personal injury protection coverage is subject to the following:

(a) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under personal injury protection have been paid by another insurer, including the Workers' Compensation Fund of Utah, the insurer of

the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and

(b) that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers.

History: C. 1953, 31A-22-309, enacted by L. 1985, ch. 242, § 27; 1986, ch. 204, § 160; 1988 (2nd S.S.), ch. 10, § 10; 1991, ch. 74, § 8; 1992, ch. 230, § 9; 1994, ch. 4, § 1.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, made minor stylistic changes in Subsection (1) and rewrote Subsection (2)(a)(i), which read: "for any injuries sustained by the injured while occupying another motor vehicle owned by the insured and not insured under the policy."

The 1992 amendment, effective April 27, 1992, inserted "or is required to have" near the beginning of Subsection (1).

The 1994 amendment, effective May 2, 1994, added "or permanent impairment based upon objective findings" to the end of Subsection (1)(c); made a stylistic change in Subsection (3)(b); and added letter designations in Subsection (5).